Supreme Court, U.S.
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No. 87-69

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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SACILOR, ACIERIES ET LAMINOIRS DE LORRAINE, BERGROHR-HERNE, and VALLOUREC,
*Petitioners,*

v.

UNITED STATES OF AMERICA, MALCOLM BALDRIGE, SECRETARY OF COMMERCE, UNITED STATES DEPARTMENT OF COMMERCE,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

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## PETITIONERS' REPLY MEMORANDUM

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October 26, 1987

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## PETITIONERS' REPLY MEMORANDUM

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The United States, in its opposing brief, has chosen either to ignore petitioners' arguments or attempts to undercut them by asserting facts it must know to be incorrect and unsupportable. In view of respondents' inability to deal with petitioners' arguments directly and in a forthright manner, one can only presume that respondents have no adequate response.

## I. PETITIONERS HAVE STANDING TO PURSUE THE INSTANT ACTION

In their brief in opposition, respondents argue that petitioners have no standing since (i) there was nothing in the record to indicate that the European Communities ("E.C.") would issue the necessary licenses to petitioners, and therefore there was no assurance that petitioners' complaint could have been redressed by a favorable judicial decision, (ii) Congress enacted the Steel Import Stabilization Act [1] ("SISA") exclusively for the benefit of domestic steel purchasers and producers, and (iii) only the E.C. (and not foreign exporters) has the right to make short supply requests. These assertions are patently incorrect.

As indicated in the petition (at 18, n.23), when the Secretary of Commerce makes an affirmative short supply determination involving exports under one of the steel trade arrangements concluded with the E.C. pursuant to the SISA, the necessary export licenses are automatically granted by the E.C. Indeed, even if the issuance of such licenses was not automatic, it would be highly illogical to suppose, as the court below and respondents do, that after supporting the short supply request in question, the E.C. would then fail to issue the export licenses following an affirmative short supply determination. In any case, in view of the egregious mischaracterization of this issue, the E.C. has submitted a letter of October 16, 1987 which appears in Exhibit A hereto, making it perfectly clear that if an affirmative short supply determination is made, there can be no question that the necessary export licenses will be issued as a matter of course. Thus, standing redressability is clearly established.

As for the prudential aspects of the standing doctrine, Section 802 of the SISA makes clear that the primary

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[1] Title VIII of the Trade and Tariff Act of 1984 (Pub. L. No. 98-573, Oct. 30, 1984), 19 U.S.C. § 2253 note.

purposes of the legislation were to remove the injury to the U.S. industry resulting from *unfair* foreign trade practices regarding steel products. Neither the statute nor the statutory scheme demonstrate any clear Congressional intent to preclude foreign manufacturers from maintaining actions to review short supply determinations. Indeed, in order to deprive petitioners of standing, clear and convincing evidence of such Congressional intent would be required.[2]

In fact, the administrative scheme established by the Commerce Department and recognized by the Congress,[3] involves the regular filing of short supply requests by foreign exporters. As noted in the petition (at 23), numerous short supply requests have been filed directly with the Commerce Department by foreign exporters. Notwithstanding the representations of respondent Department of Commerce, as a matter of public record, these requests have been accepted and processed in a routine manner. It would be absurd to allow foreign exporters to file short supply requests and then, once denied, prohibit them from pursuing judicial challenges to such denials.

Finally, the respondents have ignored totally petitioners' arguments concerning the confusion in the time di-

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[2] 5 U.S.C. § 701(a)(1), *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-46 (1984), *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. ——, 106 S. Ct. 2860, 2866 (1986), *Clarke v. Securities Industry Ass'n*, —— U.S. ——, 107 S. Ct. 750, 758 (1987).

[3] The Congressional report on the *Adequacy of Federal Enforcement of Steel Import Program* states:

> Fourth, 'short-supply' clauses are written into each of the VRA's. If a particular product cannot be manufactured in the United States, the importer *or the exporter in the VRA country may petition* to be allowed to exceed the country's quota limit on the product or product category. H.R. Rep't No. 99-937, 99th Cong., 2d Sess. (1986) at 12 (emphasis added).

mension of the standing and mootness doctrines (Pet. at 17-19) that the Court of Appeals decision will promote. One can only assume that respondents have no answer to these arguments.

## II. PETITIONERS' CLAIMS ARE NOT MOOT

Petitioners have argued (Pet. at 11-16) that their claims are not moot for two separate and independent reasons: the "capable of repetition, yet evading review" doctrine and the collateral effects doctrine. Respondents chose to address only the former. In this regard, respondents argue that the "capable of repetition, yet evading review" doctrine does not save this case from the bar of mootness because the Secretary of Commerce's order has not yet expired. This disingenuous reasoning ignores the realities of commercial life, *to wit*, purchasers will not wait an indeterminate amount of time to complete their obligations to third parties, while aggrieved exporters, such as petitioners, subject to the SISA, pursue lengthy judicial review of arbitrary short supply determinations. Therefore, purchasers will inevitably pursue alternate sourcing in order to fulfill their commitments. Once such alternate sourcing takes place, the Secretary's decision has, in effect expired. Nevertheless, as in *Brock v. Roadway Express, Inc.*, —— U.S. ——, 107 S. Ct. 1740 (1987), similar controversies between these parties are likely to recur. Because petitioners are among the largest exporters of steel to the United States, the proper scope of judicial review of the Secretary of Commerce's denials of short supply requests is certain to be a subject of contention for these parties in the future.

Moreover, as noted, the Secretary's decision in this case has important collateral consequences. Respondents leave unanswered petitioners' arguments, based on the holding of the Court in *Powell v. McCormack*, 395 U.S. 486 (1969), that the instant case is not moot since pe-

titioners retain a claim for money damages against the U.S. Government.

## CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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* Counsel of Record

October 26, 1987

**EXHIBIT A**

COMMISSION
OF THE EUROPEAN
COMMUNITIES

Directorate-General
Internal Market and Industrial Affairs

III/E/1

Brussels, 16 October 1987
DB/cg

Pierre F. de Ravel d'Esclapon
Donovan, Leisure, Newton and
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Re: EEC/US Steel Pipe and Tube Arrangement

Dear Sir,

Thank you for the telecopy of 14 October 1977 which you sent to our Washington Delegation requesting clarification of the EEC's procedure for issuing short supply Licenses.

Whenever the EEC is informed by the United States Department of Commerce that pursuant to Article 8 of the Pipe and Tube Arrangement, a shortage of supply for a particular product has been identified, the EEC immediately makes available a special issue License for the additional quantity permitted to the European pipe or tube producer on whose behalf the request for a short supply determination was filed.

Yours faithfully,

/s/ J. Faure'
J. FAURE'